

THE LAWYER'S MIND: WHY A TWENTY-FIRST CENTURY LEGAL PRACTICE WILL NOT THRIVE USING NINETEENTH CENTURY THINKING (WITH THANKS TO GEORGE LAKOFF)

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I. INTRODUCTION: PREMISES AND PERSPECTIVES

A. Premises

This article begins with a premise obvious to most practitioners of the law and readers of this law journal, although this premise did not take deep root in mainstream twentieth century legal education: Lawyers with a thriving legal practice have a sound grasp of the substantive and procedural law in their area of specialty, and they also exhibit wisdom.

Such wisdom manifests in how lawyers blend knowledge of the objective with an understanding of the subjective. They display high levels of emotional intelligence (EI)¹ through their savvy about a wide range of people and their motivations. These lawyers approach their work holistically,² seeking to understand their client's situation not as a set of technicalities,³

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¹ Florallynn Einesman & Linda Morton, *Training a New Breed of Lawyer: California Western's Advanced Mediation Program in Juvenile Hall*, 39 CAL. W. L. REV. 53, 53–54 (2002) (quoting PETER SALOVEY & JOHN D. MAYER, EMOTIONAL INTELLIGENCE, IMAGINATION, COGNITION, AND PERSONALITY 185, 189 (1989–1990)) (describing EI as a commonly accepted definition of emotional intelligence, as it may apply to legal practice and education, and as “the subset of social intelligence that involves the ability to monitor one’s own and others’ feelings and emotions, to discriminate among them and to use this information to guide one’s thinking and actions.”).

² See Phyllis E. Bernard, *Teaching Ethical, Holistic Client Representation in Family ADR*, 47 LOY. L. REV. 163 (2001) (describing how the Oklahoma City University School of Law (OCU) ADR curriculum has used a multi-disciplinary approach to prepare students for law practice confronting issues of domestic violence, psychological abuse and high conflict).

³ This basic assumption underlies the mainstream, Langdellian approach to legal education, which predicates that “law is a science, that its ‘data’ consists of cases, and that the study of law facilitated orderly, near-mathematical prediction of results.” Molly

but as a web of interconnected social, psychological, economic, relational, reputational, and status concerns.⁴ Problem-solving on behalf of a client does not follow a simple checklist or formula, discounting the role of emotion.⁵ Rather, these successful counselors-at-law appreciate and anticipate the non-rational processes of human decisionmaking.

The second premise is that while some individuals may have relatively low innate levels of EI, the foundational skills of alternative dispute resolution (ADR) can substantially raise their performance as lawyers. One need not be a savant in order to understand the complex needs of a client and offer appropriate options.⁶ Nevertheless, even lawyers born with high levels of EI can merit from training in ADR skills.⁷ The techniques offer a reliable

Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85, 95 (1998).

⁴ This is one of the more important, yet less referenced provisions of the American Bar Association ("ABA") Model Rules of Professional Conduct ("MRPC") 2.1 Attorney as Advisor, esp. Comment 2: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations . . . or effects on other people, are predominant." MODEL RULES OF PROF'L CONDUCT R 2.1 cmt. 2 (2007). Also Comment 4 encourages a cross-disciplinary approach when matters "go beyond strictly legal questions" and would benefit from advice by professionals in "psychiatry, clinical psychology or social work." *Id.* at cmt. 4.

⁵ Both the rational, objective and non-rational, subjective play roles in selecting whether and how to negotiate, litigate, or settle. *See, e.g.*, Lawrence M. Watson, *Initiating the Settlement Process—Ethical Considerations*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 7 (Phyllis Bernard & Bryant Garth eds., 2002). The impact of emotion on family cases and criminal cases is well acknowledged. Victim impact statements designed to humanize the defendant and vivify the victim probably present the most potent titration, creating a nearly inextricable blend of law and emotion. *See* Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996). The role in commercial, transactional matters often has been underplayed until quite recently and will be discussed more fully in Section IV of this article. A growing body of literature addresses the issue from the perspective of economic and behavioral theory. *See* Gerald L. Clore, *For Love or Money: Some Emotional Foundations of Rationality*, 80 CHI.-KENT L. REV. 1151 (2005).

⁶ Clinical law programs have long focused efforts on raising levels of emotional awareness in students through direct client interactions that require empathy, patience, and listening skills in order to develop the facts necessary to proceed with due care. Some programs and professors have incorporated new developments in understanding cognition to enhance the quality of problem-solving in the lawyer-client relationship. *See, e.g.*, Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLINICAL L. REV. 623 (2003).

⁷ Law is inherently a highly people-oriented profession, thus requiring skill at communication. Consider the basic lawyering skills of "fact-investigation, planning, drafting, research, trial strategy and tactics, and advocacy." The skills needed to

method that creates a therapeutic distance within the representation, allowing empathy with detachment.⁸

The third premise of this article holds that a model of legal education grounded in the nineteenth century, continued with little change through the twentieth century, ill-serves American legal practice in the twenty-first century. An Enlightenment Era focus on abstract legal theory—excluding emotional content and the non-rational processes of human understanding—may have superficially appeared adequate until now.⁹

However, the environment for law practice has changed. The twenty-first century has introduced more efficient, cost-effective substitutes if a person or entity feels satisfied with a limited, linear approach. Interactive computer programs facilitate nearly do-it-yourself drafting of many legal documents, through CDs¹⁰ and web sites such as *LegalZoom*.¹¹ More sophisticated

maximize these functions are “human relation skills,” e.g., “interviewing, counseling, negotiating, communications, and emotional understanding in general.” Michael L. Perlin, *Stepping Outside the Box: Viewing Your Client in a Whole New Light*, 37 CAL. W. L. REV. 65, 71 (2000).

⁸ This becomes more important, obviously, in client representations that register high on the scale of emotional demands, such as cases involving trauma, where the legal professional can become victim of “secondary traumatization.” Ann E. Freedman, *Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL’Y & L. 567, 649 (2003). To maintain empathy while still completing the hard tasks for which the lawyer is hired, the practice of “compassionate witnessing” can be helpful, and is a variation on the idea of establishing a therapeutic distance between the lawyer and client. *Id.* at 648–49.

⁹ This is not to say that prior generations of legal educators have ignored the gap between the law school classroom and law practice. As Prof. Karl Llewellyn urged in the mid-twentieth century, law teaching must restructure its approach to help students turn “legal or human knowledge into action.” Perlin, *supra* note 7, at 72. Judge Jerome Frank criticized the pedagogical approach enshrined by Dean Langdell in the 1870s. Frank found it unhelpful in understanding the lawyer-client relationship. The Langdellian case book study taught by Socratic Method failed to address the “numerous non-rational factors” involved. *Id.* As Frank observed, the “‘atmosphere’ of a case—everything that is undisclosed in upper-court opinions—was virtually unknown to (and was therefore all but meaningless) to Langdell.” *Id.* Hence, “[t]he greater part of the realities of the life of the average lawyer was unreal to him.” *Id.*

¹⁰ Digital and hard copy legal forms and legal guides continue to grow in availability and sophistication. See, e.g., US Legal Forms, <http://www.USLegalForms.com> (last visited on Oct. 7, 2009); Law Depot, <http://www.lawdepot.com> (last visited on Oct. 7, 2009); Nolo, <http://www.nolo.com> (last visited on Oct. 7, 2009). Through educational web sites such as these, few areas of basic commercial, consumer, landlord-tenant or property law need overwhelm a well-educated person whose cost-benefit analysis favors self-representation over attorney-representation.

business clients and law firms can find less expensive alternatives to traditional law firm structures through online global outsourcing of basic legal research.¹²

In the twenty-first century, a thriving legal practice in America will adopt ADR's active listening and problem-solving skills for everyday communication with clients, client constituents, adversaries, and among the legal team itself.¹³ Clients unwilling to use online or outsourced legal research will expect increasingly customized attention. Corporate clients will retain law firms that appreciate a business's preference for conflict prevention as much as skills in conflict resolution.¹⁴ Cultural competence—

¹¹ LegalZoom, <http://www.legalzoom.com> (last visited on Oct. 7, 2009). *LegalZoom* was established with the mission of helping lay persons, experienced businesspeople, and lawyers "[s]ave time and money on common legal matters!" *Id.* The legal document site was created by "top attorneys" to provide on-line document services that are "reliable," timely, and are guaranteed to satisfy. *Id.* Topics covered include a wide range of standard business matters such as incorporation, partnership agreements, and joint venture agreements; wills and living wills; copyright, trademark, and patents. *Id.* Celebrity attorney Robert Shapiro, a member of the O.J. Simpson "dream team" is a co-founder of *LegalZoom*. *Id.*

¹² The American Bar Association reported in a September 2008 article that "in each of the last three years, the legal outsourcing industry has grown by 60 percent, . . . In India alone, its estimated \$80 million industry expects to grow to \$4 billion by 2015." American Bar Association, *ABA Says 'Yes' to Legal Outsourcing*, available at www.abanet.org/media/youraba/200809/article09.html (last visited September 15, 2009). In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued a landmark Ethics Opinion 08-451 which permitted legal services outsourcing to lawyers or non-lawyers, so long as confidential information is protected, the service providers are competent, and the fees are reasonable. *Id.* The ABA Section of Labor and Employment Law covered outsourcing of legal work as a topic in its spring 2009 meeting in Seattle, WA. Linda Young, *American Bar Association Convention Focuses on Challenges of Technology in Workplace, Law Practice*, ALL HEADLINE NEWS, Apr. 22, 2009, www.allheadlinenews.com/articles/7014882274. The concern expressed: "some research and mundane tasks . . . [are] now being outsourced to lawyers in India because the lower cost of living there means lawyers in India can work for one-fifth the pay of U.S. lawyers." *Id.* And this "is resulting in U.S. lawyers losing jobs." *Id.*

¹³ This has already become the norm among lawyers engaged in family disputes, particularly since such representations require significant interdisciplinary work, and consulting with therapists, social workers, and psychologists. See, e.g., Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REV. 1 (2006).

¹⁴ A significant indicator of the emerging law firm focus on building and maintaining value for clients beyond the mere preparation of documents is the trend toward fixed fees for transactional matters, to build a solid, long-term client relationship that withstands global competition and outsourcing. Consider the companion stories

with regard to inner corporate culture and external social order—will become an integral measure of legal competence.¹⁵

Today, we sometimes label such law practices as “transactional,”¹⁶ “collaborative,”¹⁷ “preventative,” or specialists in ADR. Soon, such thriving law practices will simply need to call themselves “counselors-at-law.”

B. Perspectives

We shall view these premises through multiple perspectives. These perspectives offer a range of ways to apply principles to practice. These illustrate the potential breadth of ADR's influence not as a separate area of specialization, but as a standard, significant skill set essential to client representation. We begin with a broad treatment of the lawyer's role rooted in the nineteenth century. We then review two stark examples of poor translation (literally and metaphorically) when lawyers adhered strictly to a cognitively linear and culturally insular model of practice. We close by reverse engineering an actual business conflict, considering how a law firm using a twenty-first century model—using ADR skills and processes—can create value for the client.

posted September 17, 2009 in the A.B.A. Journal online, Martha Neill, *More Firms Charging Fixed Fees, Study Says*, A.B.A. J., Sept. 17, 2009, available at http://www.abajournal.com/news/more_firms_charging_fixed_fees_study_says/; Debra Cassens Weiss, *O'Melveny Aims to Become Fixed Fee Leader Leaked Plan Says*, A.B.A. J., Sept. 17, 2009, available at http://www.abajournal.com/news/omelveny_aims_to_become_fixed_fee_leader_leaked_plan_says.

¹⁵ Transactional work usually is “classified as cooperative in nature” as compared to commercial litigation. “[A]dvising and counseling clients” about “planning transactions in light of legal rules” comprise the core functions of the counselor-at-law. Alfred Dennis Mathewson, *Commercial and Corporate Lawyers 'n the Hood*, 21 U. ARK. LITTLE ROCK L. REV. 769, 772 (1999). The lawyer who can “engage in discourse with clients and others on cultural issues”—such as the role of the business in the context of community—adds heightened value. *Id.* at 777.

¹⁶ As suggested later in this article, there may be occasions when the use of a mediator to facilitate business deals can enhance the clarity and thus the durability of contracts. Consider Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283 (2004).

¹⁷ Collaborative lawyering can often be described as a conscious method to bring ADR skills to the center stage of problem-solving on behalf of clients. See David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11; James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431 (2002).

II. NINETEENTH CENTURY THINKING ABOUT THE LAW

A. *The Enlightenment Model of Legal Reasoning v. Twenty-First Century Understanding of Human Cognition*1. *The Enlightenment Model*

It may be too easy for modern critics, this author included, to overlook positive attributes of the Enlightenment, especially its impact on law and justice. The Enlightenment's model of legal reasoning idealized logic that matched doctrines to facts with cool, depersonalized precision. The philosopher René Descartes is credited with articulating the motto for this approach: "I think, therefore I am."¹⁸ Later came the counter-motto of the Romantics: "I feel, therefore I am," ostensibly from Jean-Jacques Rousseau.¹⁹ While respect for thinking has achieved primacy in American legal education, feeling remains disdained. This article argues for respecting both.²⁰

¹⁸ RENÉ DESCARTES, *MEDIATIONS ON FIRST PHILOSOPHY*, in *DISCOURSE ON THE METHOD AND MEDITATIONS ON FIRST PHILOSOPHY* 65 (Hackett 1998) (1641) ("I am . . . precisely nothing but a thinking thing; that is, a mind, or intellect, or understanding, or reason—words of whose meanings I was previously ignorant. Yet I am a true thing and am truly existing; but what kind of thing? I have said it already: a thinking thing."). Descartes's words open the door to a greater embrace of non-rationality than later iterations of his work, as he describes himself as a "thinking thing" that "doubts, understands, affirms, denies, wills, refuses, and that also imagines and senses." *Id.* at 66. Nevertheless, the ultimate mechanism for processing these sensibilities is linear, mathematical.

¹⁹ Kathleen B. Jones, *Citizenship in a Woman-Friendly Polity*, 15 *SIGNS: J. WOMEN CULT. & SOC'Y* 781, 792–99 (Summer 1990). This famous, organic retort to the mechanistic model of Descartes has taken on new life in feminist, womanist, and race theory. *Id.* Despite the fundamentally sexist message of Rousseau, namely, that women's sexuality was so potent as to be disruptive to society, the concept "I feel, therefore I am" has fed a line of thought in the background of this article. The values of feeling, trust and mutual respect can transform relationships in business and in communities, creating an inclusive professional and political discourse. *Id.*

²⁰ In many ways the recent report by The Carnegie Foundation for the Advancement of Teaching calls for this same balance in legal pedagogy. See WILLIAM M. SULLIVAN ET AL., *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007). As suggested by a leading legal educator in ADR, experienced in the corporate sector, our next goal should be learning to "feel like lawyers." Nancy A. Welsh, *Looking Down the Road Less Travelled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*,

In the eighteenth century, to use ostensibly pure logic as a guiding principle was innovative and challenging. Prevailing legal processes emphasized superstition and blind loyalty to convention. Independent thought anchored in rationality brought a change in jurisprudence. Instead of law being decided based primarily on caprice of class, status, religion, or favoritism, parties could expect a measure of predictability. Theoretically, redress of injuries could be achieved based upon rational proofs decoupled from social status or superstition. Lawyers could marshal facts and figures to demonstrate to a judge and jury linear proofs that rationally identified a winner and loser.

Enlightenment theory, as critiqued by Prof. George Lakoff, presumes that “reason is conscious, literal, logical, unemotional, disembodied, universal,”²¹ and “value-neutral.”²² These now-disputed assumptions permeate modern American legal education, law practice, and some of the most widely disseminated models of negotiation and mediation. Client counseling, negotiation, and mediation often appear to be conceived and executed according to a formula: create a logical argument, repeat it long enough, and the problem will resolve itself.

Reflective legal practitioners and ADR neutrals understand that such linearity is a myth. Yet, until the most recent research on neurolinguistics, we did not necessarily understand the science that explains why the reality of human problem-solving rarely matched the formula.

2. *Modern Neurolinguistics*

Many assumptions about human discourse and reasoning based on the Enlightenment simply do not mesh with the functioning of the human brain. Most brain functions are not conscious and rational, but are unconscious and non-rational. The restating and reframing skills of ADR allow discourse that reaches below the conscious statements to the unconscious assumptions.

Studies in neurolinguistics have revealed that most human thought processes occur below the level of consciousness.²³ This “cognitive unconscious” dominates most of our brain function.²⁴ It is silent and

2008 J. DISP. RESOL. 45, 46. Defining both thinking and feeling as legal skills would enable lawyers to “appreciate and manage the human connections and moral obligations” of practice. *Id.* at 47.

²¹ GEORGE LAKOFF, THE POLITICAL MIND: WHY YOU CAN’T UNDERSTAND 21ST CENTURY POLITICS WITH AN 18TH CENTURY BRAIN 3 (2008).

²² *Id.* at 7.

²³ *Id.* at 3.

²⁴ *Id.* at 9.

reflexive, residing at the deepest level of our neural pathways for processing information.²⁵

Our neural centers integrate intellectual and emotional content so seamlessly that humans rarely reflect upon their inextricable nature.²⁶ That is to say, except when law schools demand that students “think like a lawyer.”²⁷ This pedagogical principle tries to impose an artificial separation between facts and feelings; a dichotomy that lawyers in practice understand is often false.²⁸ As stated by Bush and Folger, “there are facts in the feelings.”²⁹ How a person subjectively perceives a situation becomes as powerful (or more powerful) as whatever objective rendition of the facts might present. Thus, wise, modern legal counsel approach the representation with an appreciation for emotion and the impact of emotion on facts.

Just as facts are not disembodied abstractions, thought itself does not exist “free of the body, and independent of perception and action.”³⁰ Neither clients nor lawyers can truly be expected to conform their conduct to theory, standing alone. Despite our best efforts at education, humans do not think in ways “consistent with the properties of classical logic.”³¹ Thus, lawyerly discourse that speaks solely to logic has little capacity to effect change.

Rather than thinking in a literal, linear manner, the unspoken framing of individuals and groups is metaphorical.³² Even when we attempt to proceed

²⁵ *Id.*

²⁶ *Id.* at 28.

²⁷ A tight summary of the problem and proposed solutions are presented by Nancy A. Welsh, *supra* note 20.

²⁸ The popularly titled “MacCrate Report” encouraging law schools to improve the practice skills of students was named for Robert MacCrate, Chairperson of the Task Force on Law Schools and the Profession. *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. [hereinafter MacCrate Report], available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>. This primary message of the MacCrate Report was echoed a decade later by the “Carnegie Report.” SULLIVAN ET AL., *supra* note 20.

²⁹ Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 271 (1996).

³⁰ LAKOFF, *supra* note 21, at 7.

³¹ *Id.* at 7.

³² LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 9–10 (2006). Rosen sees metaphor as

the key mechanism through which all of the crucial connections among cultural domains take place. To speak of one’s body as a ‘temple,’ home as a ‘castle,’ intellectual life as ‘a marketplace of ideas,’ or equality ‘as a level playing field’ is far more than mere wordplay: Such metaphors connect what we think we know with

in a rational, logical manner, the logic of our own minds does not necessarily fit the logic of the world.³³ Despite how much we might try, we are not unemotional, “free of the passions.”³⁴ The impact of these metaphorical frames and the power of cultural narratives propel the dynamics in the corporate representation presented in *Sanchez v. Friar Co.*³⁵

Finally, without the intervention of an able facilitator—oftentimes the wise counselor-at-law—humans do not think in ways that are value neutral. Thus, despite the Enlightenment credo, the same reason does not apply to all situations, regardless of personal values.”³⁶ The assumption that reason is universal and consistent animates the concept of professionalism that frames American legal practice. It also creates a trap for the unwary attorney who persists in practicing according to the values of his closed community of peers, instead of reaching out to ask about and address the values of his prospective client. This frames the legal malpractice cases discussed in Section III.³⁷

B. *The Nineteenth Century Ideal of Legal Practice: The Sharswood Tradition*

The nineteenth and twentieth century models of lawyering attempt to make operational Enlightenment concepts of the law. The model has often been caricatured as little more than a rote application of principles of law, unsullied by the realities of emotion. Not so; feelings existed. However, the task of the gentleman lawyer was to suppress those feelings.³⁸ The lawyer as

what we are trying to grasp, thus becoming potent symbols of how a people understand themselves and their world.

Id.

³³ LAKOFF, *supra* note 21, at 8; *see also* ROSEN, *supra* note 32, at 4 (“[W]e create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real.”).

³⁴ LAKOFF, *supra* note 21, at 7.

³⁵ *See* discussion *infra* Part IV.B.1.

³⁶ *Id.* at 7.

³⁷ *See* discussion *infra* Part III.

³⁸ JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008). Macfarlane exhorts the legal profession to “open up and reappraise some of the ‘sacred texts’ of lawyering”—including Sharswood, although not by name. The bar-centered approach rooted in the nineteenth century is part and parcel of the flat and narrow dimensions of “old lawyering” where the most highly valued skills are those regarding trial advocacy. *Id.* at 23. The new paradigm of lawyering integrates

gentleman saved his expressed empathy more for other members of the bar and bench than for his client, opposing party, or society at large.³⁹

This presents one skeptical reading of the nineteenth century tradition of professionalism transmitted through the legendary lectures of Judge George Sharswood, Dean of the University of Pennsylvania Law School. His seminal talks on the lawyer's duties and comportment evolved over time into the core of the American Bar Association's first Canons of Professional Conduct.⁴⁰ Some of Sharswood's lectures may invoke images of snobbery, exhorting lawyers to conform to aristocratic concepts of deportment, including displaying the characteristic garb of the upper class (gloves, hat, and starched white cuffs).⁴¹ Sharswood's original message went beyond surface

ADR skills into every aspect of law practice "[s]pecialist [subject matter] expertise and partisan [non-collaborative] advocacy" that do not fade away, but instead are wholly replaced by consensus-building. Rather, heightened interpersonal communication skills will distinguish the twenty-first century lawyer from the Enlightenment paradigm. Instead of the "traditional 'trust me' detachment of the old lawyer," lawyers in a thriving twenty-first century practice value "empathy, self-awareness, optimism and impulse control" as core skills essential to provide a "participatory model of compassionate, client-centered, professional service. *Id.* at 23–24.

³⁹ Cross-cultural tensions abounded within the nineteenth century legal profession. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 638 (2d ed. 1985). To illustrate the tenor of the times, consider the following quote:

Old-line lawyers were never too happy about the influx of "Celts," [Irish] Jews, and other undesirables. George T. Strong, writing in his diary in 1874, hailed the idea of a test for admission at the Columbia Law School: "either a college diploma, or an examination including Latin. This will keep out the little scrubs (German Jew boys mostly) whom the School now promotes from grocery-counters . . . to be 'gentlemen of the Bar.'"

Id. (emphasis in the original).

⁴⁰ For a fuller but not burdensome discussion of Sharswood's role in shaping the canons and the social/cultural norms of the legal profession, see Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 34–36 (1992).

⁴¹ A leading scholar on the legal ethics and the development of the profession suggests that the lawyer-centered approach to "moral discernment" that Sharswood espoused may owe to the changing demographics of Philadelphia at mid-nineteenth century. The Civil War was approaching. Industrialization and immigration had changed the face of the nation and encroached upon the "enclave of British manners and morals" of which Sharswood was a member. Thomas L. Shaffer, *Towering Figures, Enigmas and Responsive Communities in American Legal Ethics*, 51 ME. L. REV. 229, 231 (1999). Friedman offers more demographic insight: "In 1800, lawyers in Philadelphia came 'predominantly from families of wealth, status, and importance.' In 1860 a much higher percentage came from the middle class—sons of shopkeepers, clerks, small businessmen." FRIEDMAN, *supra* note 39, at 634.

appearances. In some ways he exhibited a deeper appreciation for the human complexities of representation than found in the latter quarter of the twentieth century.⁴² Sharswood attempted squarely to resist “conversion of the profession into a ‘mere’ trade business or trade.”⁴³ This issue has, if anything, grown more critical in the twenty-first century when globalization and computerization place the definition of “lawyering” into flux.

A more positive reading of the Sharswood approach would place professionalism above financial gain, not necessarily wealthy attorneys (e.g., landed gentry) above the urban, middle class who practiced law to earn a living.⁴⁴ Nevertheless, the nineteenth century orientation for the legal engagement did not center on the client, but on the lawyer and his (at that time, always “his”) relationship to the bar and bench. To that end, at times the lawyer may rightly consider placing his reputation among colleagues ahead of his client’s needs.⁴⁵

The Sharswood tradition encouraged elite practitioners to maintain an attitude of rectitude.⁴⁶ Later interpretations took this as a justification to

⁴² A witty and cogent analysis, integrating Sharswood and the early ABA Canons, is provided in Michael I. Krause, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325 (2001).

⁴³ FRIEDMAN, *supra* note 39, at 634.

⁴⁴ Consider the extended discussion of compensation, lauding the ancient practice of legal counsel receiving no fees, but only honoraria, and shuddering at the thought that law practice would decline “from an honorable office to a money-making trade.” GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 142 (4th ed. 1876).

⁴⁵ Sharswood often admonished young lawyers not to aggravate or give offense to other members of the bar. One should avoid the reputation of being a “sharp practitioner.” Instead, he should

be liberal to the slips and oversights of his opponent whenever he can do so, and in plain cases not shelter himself behind the instructions of his client. The client has no right to require him to be illiberal—and he should throw up his brief sooner than do what revolts his own sense of what is demanded by honor and propriety.

Id. at 74–75.

⁴⁶ Sharswood states,

Indeed it is highly important that the temper of an advocate should be always equal. He should most carefully aim to repress everything like excitability or irritability. When passion is allowed to prevail, the judgment is dethroned. Words are spoken, or things are done, which the parties afterward wish could be unsaid or undone. Equanimity and self-possession are qualities of unspeakable value.

Id. at 64.

disdain emotions generally;⁴⁷ but especially when those feelings emanated from a client or party in a lower social stratum.⁴⁸ Logic ostensibly ruled not only law, but relationships.

Recent scientific research on the neurophysiology of thought has shaken this cornerstone of Enlightenment thinking and associated theories. Practitioners, educators, and corporate clients question anew: how does a lawyer create value for the client through the legal engagement?⁴⁹ As a baseline, lawyers are expected to know the substantive law. But, what makes a law firm worth the fees demanded? Is it by dispensing knowledge about rules,⁵⁰ or by understanding relationships?⁵¹

⁴⁷ This tension reveals itself most prominently in ongoing debates about preferred methods of law teaching, and whether those methods best serve the needs of practitioners and the public. The MacCrane Report challenged the law schools to enlarge their offerings beyond the Langdellian case book model using the Socratic Method; instead, to expand the use of clinical programs to bridge the considerable gap between relatively simplistic theories as taught in class and the complexities of real life engagements. MacCrane Report, *supra* note 28. For a defense of the nineteenth century model focusing on neutral legal principles, see Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267 (2007) (responding to feminist critiques of the lack of change in legal education since the MacCrane Report first issued).

⁴⁸ Like many Ivy League institutions, the University of Pennsylvania Law School maintained a long tradition of exclusive and exclusionist social clubs which indoctrinated law students into the culture of the elite. Those norms mirrored the traditional demographic niche of the Ivy League: whites-only, Christians (preferably Protestants)-only, upper class-only. At the same time, the law school also admitted women and minorities, beginning in the nineteenth century. The law school's social clubs fell into disfavor during the latter 1960s and were temporarily disbanded until they were revived in the 1970s with open membership, welcoming all students irrespective of religious background, ethnicity, or national origin. I was not only a member, but membership director of the Sharswood Law Club as a second and third year law student (1979–1981), wholly naïve about the irony: a West-Indian-American woman with a Jewish husband who was encouraged to invite club members based upon their affability, not pretensions to aristocracy. Hopefully, the revived Sharswood Law Club managed to keep alive the best parts of the Sharswood credo: do not limit oneself to a narrow life of the law only; read, enjoy diversity, and “cultivate, above all things truth, simplicity and candor” as the cardinal virtues of a lawyer. SHARSWOOD, *supra* note 44, at 132–33, 169.

⁴⁹ See Symposium, *Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1 (1995).

⁵⁰ The contrast between a rules-orientation and a relationship-orientation often shows best in reviewing the role of listening and narrative in informal court proceedings where a party tells her story in a non-sequential manner, often infused with a measure of non-verbal oral performance in order to persuade. JOHN M. CONLEY & WILLIAM M.

Lakoff has brought evolving insights on human cognition to the analysis of discourse designed to change behavior. One could readily define such discourse as a key function of the lawyer. The findings: effective argumentation must speak to the non-rational as much as—or even more than—the rational, whether the forum is politics⁵² or law.

In both the nineteenth and twentieth centuries, the ethos of emotional non-engagement generally fared less well in practice than portrayed in theory. Purely rational, non-personal discourse translated poorly across class lines was welcomed primarily by privileged individuals who shared the same cultural narrative.⁵³ This gave the legal system a tarnished reputation for justice among the working class, minorities, and women, as modern scholars of law and culture have documented.⁵⁴ In some contemporary legal systems,

O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 40–44 (1990).

⁵¹ This becomes particularly important when engaged in cross-cultural business transactions. As demonstrated in the final section of this article, cross-cultural dissonance about formal and informal norms can arise as easily within the forty-eight contiguous states as overseas. One way to conceptualize the importance of rules and relationships is to look at the

rule of law [as] a social practice: . . . a way of being in the world. To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation. It is to understand the actions of others and the possible actions of the self as expressions of those beliefs. Without these beliefs, the rule of law appears as just another form of coercive governmental authority.

PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 36 (1999).

⁵² LAKOFF, *supra* note 21.

⁵³ Consider the following explanation of presumed logic based upon shared experiences that create common culture. Rosen described the interrelationship between law and culture and how actors perceive their behavior thusly:

As a kind of categorizing imperative, cultural concepts traverse the numerous domains of our lives—economic, kinship, political, legal—binding them to one another. Moreover, by successfully stitching together these seemingly unconnected realms, collective experience appears to the members of a given culture to be not only logical and obvious but immanent and natural.

ROSEN, *supra* note 32, at 4. Rosen invites the reader to reconsider typical terminology used in American courts, such as “the conscience of the community,” “the reasonable man,” or “the clear meaning of the statute,” within cultural contexts. *Id.* at 6. Their meaning comes from collective, subjective experiences and interpretations of life summed up as “culture,” of which law is a part, not standing on its own. *Id.* at 7.

⁵⁴ See generally SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990). Merry suggests

mediation has helped ameliorate the situation by offering parties a forum that respects non-rational⁵⁵ discourse, which the courtroom shuns.⁵⁶

C. Facts and Feelings in the Modern Lawyer-Client Relationship

From the nineteenth century to the twenty-first century the nature of the relationship between attorney and client has begun to change. ADR research, best practices, and evolving thoughtful applications have reshaped the way the attorney and client interact with each other and their expectations for the representation. Even the very nature of how justice is understood has been reshaped. Negotiation and mediation reframe the way the lawyer must query the scope of engagement. Now, rather than assuming the answers, an attorney must inquire skillfully to understand:

- What are the client's underlying interests; not only the client's initial position or demand?
- How should authority be allocated between the attorney and the client?

that we should not assume a working class party typically experiences the court system as unresponsive. *Id.* at 144–45. Studies present the option that working class litigants may have had more direct and indirect experience with the criminal justice, juvenile justice, and small claims court systems concerning relatively minor offenses. This can result in a “casual attitude” about the process based upon defendants’ prior experience with lenient judges and prosecutors whose highest priority is docket management. *Id.* at 144–45. By contrast, middle class litigants who turned to the court for satisfaction may “discover that their rights to protection of property and person are weaker and more erratically enforced than they had expected.” *Id.* at 145. Interestingly, Merry notes that “these people did not expect that the courts would be different from all other institutions, that the courts would treat everyone the same, or that money and education would not matter.” *Id.* They did, however, expect that the system would not be as “complicated, frustrating and unpredictable. . . .” *Id.*

⁵⁵ Note that “non-rational” does not mean irrational. It merely means non-linear: not in a sequential style that neatly fits an exposition of facts separated from doctrine, then matched against each other.

⁵⁶ MERRY, *supra* note 54. The major theme and subject matter of Merry’s book concerns how mediation fares in resolving legal conflicts, from the perspective of the working class. The use of courts to suppress emotion in discourse receives major attention; not because of an appreciation for drama, but as an acknowledgment of the interplay among cultural norms, speech, imagery, metaphor, and social relationships. To the extent the legal system makes room for such personal narratives unhampered by procedural rules and the short time-span of a litigation docket, the party has a voice and thus a measure of power. By suppressing that voice, through formal rules or informal disdain, the party experiences domination.

- How does the attorney appropriately balance the duty to advise the client about legal rights and obligations, even to counsel concerning ethics and non-legal ramifications of choices made, without impinging upon client autonomy?
- How does the client perceive the attorney's role?
- Is the attorney able to meet the subjective and objective expectations?⁵⁷

The attorney's skill at communication forms the thread that binds all these ethical obligations. If communication skills are weak, that weakness will unravel the attorney-client bond. Negotiation's fundamental techniques of restating and reframing are essential to obtain clarity about scope of representation and informed consent. The following section presents stark examples of failed attorney-client relationships due to lack of communication to define the engagement adequately.⁵⁸

III. SECOND PERSPECTIVE: THE SHARSWOOD TRADITION COLLIDES WITH CLASS AND CULTURE

The second perspective presents a case where two lawyers who saw themselves as acting through pure reason, according to the norms of their peers, were in line with the Sharswood tradition. By so doing, they woefully disserved members of the lay public who did not share the same cultural narrative. This article addresses these cases as teachable moments, with no intention of casting aspersions upon the attorneys involved.

A. *Conflict of Norms and Language Barriers*

⁵⁷ The role of the lawyer—per se—in the era of the vanishing trial may sometimes come into question. What role does counsel play, and does this role conflict with the norms of civil negotiation and mediation? See Lawrence Fox, *Mediation Values and Lawyer Ethics: For the Ethical Lawyer the Latter Trumps the Former*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE STUDY GUIDE 39, 39 (Phyllis Bernard & Bryant Garth eds., 2002).

⁵⁸ The issues of communication discussed here do not concern merely failing to respond to telephone calls, a primary complaint among clients when seeking disciplinary action by the bar. The failure to communicate could be due to over-commitment by the attorney, or failing to understand that the client needs further information or is anxious. Consider Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008).

1. *What Is Customary? Whose Custom Controls?*

We begin with the least nuanced examples of failures to communicate. Even when the attorney and client share English as their first language, there can be confusion about what has been said and understood. Using standard active listening techniques of restating and reframing can greatly reduce such confusion. Clearly, when the attorney and client do not speak the same native tongue, and rely upon possibly inaccurate or incomplete translation or each person's broken attempts at the other's language, the representation suffers. Assuming that cultural norms are known and shared can prove costly.

The case *George v. Caton*⁵⁹ pitted the attorney's professed norms of practice in the Anglo legal community against the customs of the Navajo

⁵⁹ *George v. Caton*, 600 P.2d 822 (N.M. Ct. App. 1979). It is not easy to find reported cases that frame an attorney's cross-cultural missteps as a litigable issue. Outside of criminal law matters, one must search, seeking the implied but not explicit narrative of inadequate communication between attorney and client deriving from differences in linguistic and cultural expectations. This should not be a surprise. As explained by some excellent legal scholars on race theory, race is a lens that filters the world view of minorities, but not the majority. Why? Because by dominating the center stage of society, whites enjoy the privilege of being concerned about race only at their discretion. Racial awareness usually is not mandatory for their survival. For dominant group members—such as the attorneys in situations analogous to *George*—the assumption is that “whiteness is the norm,” and “that their perceptions are the pertinent ones, and their problems are the ones that need to be addressed, and that in discourse they should be the speaker rather than the listener.” Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Complications of Making Comparisons Between Racism and Sexism (or Other-isms)*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 648 (Richard Delgado & Jean Stefancic eds., 2000). The bias of this center-stage norm need not be restricted to dominant ethnicities. It can also include attorneys as a culture distinct from lay clientele, as discussed in Part III.A.2, *infra*. The issue is the capacity for empathy and how such emotional intelligence would give added vigor to the standard role of counseling. Consider, for example, in *Lopez v. Clifford Law Offices*, 841 N.E.2d 465 (Ill. App. Ct. 2005), the first attorney sought by an Hispanic father concerning the drowning of his daughter in a school district swimming pool gave short shrift to the matter. He declined the case through a form letter, without conducting the legal research that would have revealed his estimation of the statute of limitations was incorrect. The family did not have an additional eighteen months to file, but only six. By the time the family sought another legal opinion, the statute of limitations had expired. Query: would the Clifford Law Firm have handled the matter with greater diligence and depth if the family were not Hispanic? This is a question that leaps from the pages when the case is read by someone who sees the world through a minority lens, but most likely never occurs to a person who operates from the assumption of majority norms. It is sometimes easier to see the race lens in operation within judicial decisionmaking. Consider *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (addressing the issue of grossly unequal

Nation. Caton and White were attorneys practicing together in Farmington, New Mexico. Occasionally, over the course of three years, Caton or White would make in-person and telephone contact with Pearl George, a Navajo Indian who could neither speak nor understand English.

The groundwork for communication in these circumstances was unsteady from the outset. The attorneys faced a challenge of literal translation due to the language gap. They also confronted a problem in understanding cultural values as they may differ between the Anglo and Navajo world views. To proceed on the assumption that both literal and metaphoric logic aligned invited disaster.⁶⁰

On its face, the representation may have appeared clear and simple. George had survived a gas explosion in her trailer which killed her sister. Caton and White had approached George about representing her interests and suing the seller of the trailer. Several times during the intermittent visits they assured George that they were her lawyers and that the case was proceeding well.

The actual content of communications between Caton, White, and George do not appear in the published opinion.⁶¹ However, because the issue of representation itself evolved into a separate piece of litigation, the situation suggests that the attorneys: (1) failed to assure a neutral translator was present at all times; (2) failed to assure that statements on all sides were restated for accuracy, elaboration and modification; and (3) failed to create

bargaining power, unconscionability, and "loan shark" terms for purchases, but did not address the issues of race and poverty that made the inequities viable, nor that the terms of the credit agreement were ubiquitous in the black community that this and other such stores targeted). Despite significant evidence to the contrary, the trial and appellate judges treated the matter as one of mere individual incompetence on the part of the consumer. As one scholar has noted, "both viewed Williams through the lens of white race consciousness." Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal and Contract Law*, 63 U. CIN. L. REV. 269, 308 (1994-95).

⁶⁰ Consider also the language and culture gap that may lurk below the surface but substantial in representing even very sophisticated persons not born in America: In *In re Docking*, 869 P.2d 237 (Kan. 1994), three Korean nationals retained a single attorney to represent them, which may have been culturally appropriate under Korean norms, but failed to take into account conflicts of interest under American law. The attorney failed to engage the services of an attorney or translator fluent in Korean and/or knowledgeable about Korean culture. *Id.* at 238. The husband and wife yielded to the attorney's stern demands that they accept a plea bargain, despite their claims and offers of proof of innocence. *Id.* The judge vacated their sentences and set aside their guilty pleas. The State declined to re-prosecute the defendants. *Id.* One can readily infer that the second attorney was better able to bridge the culture and language gap.

⁶¹ *George*, 600 P.2d. at 822.

contemporaneous documentation of memorializing those discussions. Clearly, insufficient attention was devoted to assuring that an attorney-client relationship existed, as well as to what the client expected the attorneys to do on her behalf and what the attorneys understood to be achievable.

Objective and subjective expectations clashed, or perhaps more accurately, missed the vital connection. Were the attorneys' visits and telephone calls semi-social visits demonstrating respect for George's loss? Were these contacts preliminary to filing claims on George's behalf? Or had the representation already begun? What is clear is that these matters were left unclear, apparently with both sides operating according to their customary interpretations of behavior—implied not explicit understandings.

Eventually, Caton and White informed George that her claim had expired due to failure to file within the statute of limitations. In their defense, Caton and White claimed that the custom among lawyers in the Farmington area was to "obtain from a prospective client prior to, and as a condition of employment in contingent fee plaintiff's cases, a written employment agreement together with an advanced deposit of costs."⁶² They argued that since these written agreements did not exist, neither did the attorney-client relationship.

In the alternative, they argued that even if a relationship had originally existed, George—the ostensible client—had such intermittent contact with them over the course of nearly three years that the attorneys acted non-negligently when they assumed that George had abandoned her lawsuit or had sought other counsel. This argument in some ways inverts the attorney-client relationship, attempting to impose the logic of the lawyer's worldview, with little consideration of the client's perspective.⁶³ The gap was as much cultural as ethical. Most Native American traditions would inhibit George from engaging in the type of assertive communication that Caton and White presumed.⁶⁴

The court made short shrift of the attorneys' defense: "Defendants had done business with Navajo Indians, were familiar with Indian tradition and

⁶² *George*, 600 P.2d at 822

⁶³ For example, corporate matters involving tribal governments require sensitivity about matters that, on their face, appear to be "routine choice of law problems," but they necessarily involve "intricate issues of sovereignty, culture, and self-determination that may vary from tribe to pueblo to reservation." Mathewson, *supra* note 15, at 777.

⁶⁴ As explained by a former Attorney General for the Seneca Nation, "in every significant aspect, the American legal system is in conflict with the manner in which native people have traditionally resolved disputes." Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 281 (1997).

the difficulties of translation of the Indian language, and orally or in writing, defendants had a duty to be precise, meticulous and definite so that no misunderstanding would arise as to the relationship of the parties.”⁶⁵

Further, the court stressed that “[n]o formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client. . . . The contract may be implied from the conduct of the parties. . . . All that is required is a statement by an attorney that he would ‘handle’ her matter.”⁶⁶ The term “handle,” which refers to taking on the legal engagement, takes on an enlarged definition when it is based on the client’s culture and subjective expectations. As the director of the Southwest Indian Law Clinic, a member of the Isleta Pueblo explained: “Even if lawyer and client speak the same language, whether it is english [sic] or another language, differences in cultural values and worldview can affect the quality of understanding.”⁶⁷

2. Who Bears the Higher Burden to Communicate Effectively—and to Prove It?

An attorney need not be confronted with a literal language barrier to find himself mired in confusion over roles and responsibilities that challenge his legal practice’s very existence. In a fast-paced legal practice it is all too easy for confusion to arise concerning who has undertaken what representation and when. Further, there can be confusion about what the attorney promised to do for the client, if anything. What may have been a mere matter of distraction can erupt as a legal malpractice action when the client—or the person who believed she was the attorney’s client—discovers her cause of action has expired due to the attorney’s failure to file a claim within the statute of limitations. Then the client—or purported client—can challenge the attorney’s conduct as having failed to comport with the standards of the legal community, as reflected in the rules of professional conduct adopted by the state bar.

Cultural context can arise even when the actors share the same ethnic heritage. Expertise in the law, being part of a profession or business, creates a culture distinct from that of the lay community. A lawyer dealing in purely logical, rational discourse with a lay person in emotional distress proceeds at his peril.

⁶⁵ George v. Caton, 600 P.2d 822, 827 (N.M. Ct. App. 1979).

⁶⁶ *Id.*

⁶⁷ Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 568–69 (1999).

The classic case on this matter is *Togstad v. Vesely, Otto, Miller & Keefe*,⁶⁸ where Mrs. Togstad met once with an attorney to request that he bring a medical malpractice action against the hospital and doctors who had left her husband in a chronic vegetative state. Mrs. Togstad was quite distraught during the interview, and left with the avowed understanding that the attorney would handle the matter on her behalf. Irrespective of ethnicity or class, Togstad presents a clash between the cultural norms of the attorney, securely center stage as the person in emotional and intellectual control, and the client, a lay person adrift in the psychological, physical and financial burdens of their circumstances.

The attorney's understanding of how the interview ended differed significantly. Namely, he believed that he had told Mrs. Togstad that she should seek other counsel promptly before the statute of limitations had run out. However, the attorney never followed up with a letter to that effect.

One can read into the appellate decision that any and all oral communications between the law firm and the presumed client were filtered through an intense emotional screen. Yes, written notifications would have supported the attorney's claims about how he had understood the discussions. However, active listening skills and calming techniques used from the outset may well have prevented the miscommunication and lawsuit that followed.

Indeed, medical professionals and medical education offer lawyers and legal education some of the best methods for improving communication and case management. Both on the medical and legal side, Mrs. Togstad's situation highlights the importance and difficulty of soliciting and receiving information when the situation is bound with profound emotional content. There are, indeed, "facts in the feelings," including facts that can make a difference in the course of medical treatment, or in legal strategy. Medical schools and physicians throughout the United States, Canada, and the United Kingdom now regularly seek to engage in the "medical narrative" to enhance their capacity for imagination, empathy, trust-building, and problem-solving. Similarly, the thriving law practice of the twenty-first century will recognize client narrative as an essential part of research, employing the full array of ADR skills to elicit their client's deep story instead of acting on mere superficial information.⁶⁹

⁶⁸ *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W. 2d 686 (Minn. 1980).

⁶⁹ See Rita Charon, *Narrative Medicine: A Model for Empathy, Reflection, Profession, and Trust*, 286 JAMA 1897 (2001) (describing narrative competence as a central feature in the effective practice of medicine of particular use in high-tech, sometimes overly specialized, otherwise episodic medical care). Dr. Charon describes the experience not only of the College of Physicians & Surgeons of Columbia University in New York City, but nationwide. One window to view the role of narrative in medicine as

B. *Building a Bridge to Communicate Across Cultures*

Rather than taking a Sharswood-era approach to the attorney-client relationship, these attorneys could have applied active listening skills to achieve a vastly different result. Restating and reframing duly applied in these cases could have assured comprehension between the client and attorney about the scope of representation and authority to act.⁷⁰ Heightened awareness of verbal and non-verbal cues coupled with appreciation for cultural context could have prevented confusion between the attorney and client that resulted in successive challenges to the lawyers' professionalism. Indeed, amendments to the American Bar Association Model Rules of Professional Conduct now reinforce the utility of active listening skills to ensure clear communication⁷¹ and informed consent.⁷²

IV. THIRD PERSPECTIVE: VALUE-CREATION LAWYERING IN CROSS-CULTURAL COMMERCE

The third perspective offers a view of legal practice involving a large corporation and a smaller business. Value is created when a counselor-at-law applies ADR skills and processes to prevent and resolve conflicts involving miscommunications around corporate and social cultures. The illustration, presented as a hypothetical, was drawn from an actual case filed in federal district court. Many practitioners might suggest that a primary reason for businesses to use legal counsel experienced in ADR is to avoid the very circumstances documented in the public record of the underlying case: (1) the internal disruption to operations; (2) the burden of defense, including

a parallel to law can be found through reading on-line conversations among physicians concerning this competence. Consider the remarks of Dr. Matthias Löhr, attending physician at the University of Rostock, Germany, responding to a 1999 article in the British Medical Journal on "The Lost Tradition" of listening and interpreting, and placing value on the human dynamics of communication, not just lab tests. The movement to formally train physicians in the art of the narrative in patient care reminded him of "the old days [when] doctors had the time to sit down with patients and listen to them." The skill of taking a history with a narrative approach was a skill that older physicians from Eastern Germany retained, but younger physicians knowing only 'modern' medicine based on testing, had lost it. Letter from Dr. Matthias Löhr, Assistant Professor & Attending Physician, Univ. of Rostock, Germany, to British Law Journal (Jan. 14, 1999), available at <http://www.bmj.com/cgi/eletters/318/7175/48#1676>.

⁷⁰ MODEL RULES OF PROF'L CONDUCT R. 1.2 (2007).

⁷¹ *Id.* at R. 1.4.

⁷² *Id.* at R. 1.0(e).

deposing of staff; and (3) a permanent, readily available record of crude, racist statements made by corporate staff, and a general sense of sub-optimal management.

A. *Conflict of Norms as Barriers to Business*

Contrary to stereotypes embedded in the swashbuckling days of the late nineteenth and much of the twentieth century, most business people consider litigation a sign of failure.⁷³ Either they have failed within their own organization, or their law firm has failed them.

Often these failures can be traced to a clash in unstated norms, shaping the culture of the corporations. On an even deeper level, cultural narratives of individuals presume norms that typically remain unarticulated. The pervasive, powerful, non-conscious cognition described in Part I can operate to create misaligned perceptions, both in sending and receiving communication among participants in a business transaction. Expectations—rarely made explicit—go unaddressed, undermining trust that the deal can continue successfully.⁷⁴

Even in business matters among business people, the non-rational, emotional processes automatically engage and can “dominate[]”⁷⁵ behavior, driving a deal into unwanted, unnecessary litigation.⁷⁶ This Part explores the

⁷³ See John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1 (1998).

⁷⁴ Some of the underlying issues that benefit from elaboration through facilitation skills early in the deal are the same that become hindrances later in the deal. I refer here to

the feelings of the parties, financial information, plans for product development, expansion, down-sizing, human resource realignments, land development, acquisitions, and other things which are relevant to the parties' intentions about their dealings with each other and conflicts or transactions that may be bigger than the concretized disputes before them.

Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem-Solver*, 28 HOFSTRA L. REV. 905, 919 (2000) (including a description of the Integrated Transactional Program at Temple University School of Law).

⁷⁵ David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275, 1298 (2008).

⁷⁶ This is not to suggest that, as a matter of law, emotional engagement or disengagement constitutes grounds for non-performance of a contract. Even in far more densely emotional situations, like surrogate motherhood, the law recognizes an expectation that negotiations will reasonably foresee the likelihood of changing

“instant evaluations”⁷⁷ and “automatic behaviors”⁷⁸ by which persons instantaneously judge and respond to surroundings, people, and interactions. These cognitive processes are the engines that can make or break a business deal.

A robust transactional law practice accepts as its norm that the “real deal” is the relationship, not the written document—the “paper deal.” The organic, everyday working arrangement incorporates unwritten social norms, cultural expectations, and personal interactions.⁷⁹ Especially in the twenty-first century—as America’s demographics shift toward a wholly multicultural society⁸⁰ and most commercial transactions will involve global entities⁸¹—a successful, sustainable law practice will view the engagement broadly, not narrowly. The attorney will keep in her central and peripheral vision “relationships of the parties within and beyond their own business community.”⁸²

In the sections that follow, this article paraphrases the actual federal court decision in *italics*; commentary, offering perspectives on how ADR skills could have opened different, better options, appears in regular face.⁸³ It is based on an actual federal case involving a leading pharmaceutical company. To permit candid elaboration on the principles without unduly tarnishing the names of the actual individuals involved, this case is presented as a hypothetical using pseudonyms.

circumstances and take that into consideration, literally. See Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 213 (2005).

⁷⁷ Arkush, *supra* note 75, at 1299.

⁷⁸ *Id.* at 1312–13.

⁷⁹ See generally Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003), updating his original analysis in, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963).

⁸⁰ US CENSUS BUREAU, POPULATION ESTIMATES PROGRAM, GENERAL DEMOGRAPHICS ESTIMATES (2007), available at http://factfinder.census.gov/servlet/QTTable?_ds_name=PEP_2007_EST&-gr_name=PEP_2007_EST_DPI&-geo_id=01000US.

⁸¹ BUREAU OF ECONOMIC ANALYSIS, U.S. INTERNATIONAL ACCOUNTS DATA (June 16, 2009), available at <http://www.gov/international/sls/table1.xls>.

⁸² ROSEN, *supra* note 32, at 15.

⁸³ This author hopes that the use of an extended narrative such as this adds to the scant body of legal discourse on narrative in business law involving the day-to-day, low-key conflicts and resolutions of “the real deal.” See generally Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537 (2007).

B. High-Context and Low-Context Business Styles in Action

1. The Deal

Peter Sanchez, a U.S. citizen of Mexican heritage, is the president and sole shareholder of National Office Products, Inc. (National). National's market niche is supplying office, laser, industrial, and computer supplies to various companies. National's principal customer is Friar Pharmaceuticals, Inc. (Friar), a leading manufacturer of cosmetics, drugs, and toiletries. This Fortune 500 company maintains its national headquarters less than ten miles from National's office.

Close proximity facilitated a fast turnaround time for orders. It also enabled easy face-to-face feedback between the staff of National and Friar. For businesspeople from cultures that value personal contact (high-context cultures),⁸⁴ this arrangement worked well. For persons culturally attuned to conducting business with a minimum of informal, personal interaction (low-context cultures), this arrangement could create a rocky beginning. It did.

Like so many other publicly held companies and other businesses that contract with government entities, Friar has a corporate purchasing program (CPP) dedicated to seeking and utilizing minority suppliers (MBEs). National began doing business as a minority supplier with Friar in 1982 or 1983. Over the next ten years Friar expanded its purchasing

⁸⁴ Some lack of clarity arises from significantly different styles of "contexting" defined as "the way people read into what is communicated in words based on the surrounding circumstances." David A. Victor, *Cross-Cultural Awareness*, in THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS 143, 153 (James R. Silkenat & Jeffrey M. Aresty eds., 1994). Victor does a superb job of placing Edward T. Hall's pioneering work on the anthropology of language into the framework of business negotiations, operating from the perspective of the practitioner. Business negotiators from "high-context" cultures might clash profoundly with those from "low-context" cultures. "In a high-context culture, negotiations are based more on what is understood than on what is explicitly stated." *Id.* at 154. Their language style is interpretive. Non-verbal communication is relied upon heavily. Thus, business people from high and low contexting cultures can clash—and their joint projects falter—without even knowing that a problem existed until it is perhaps too late to resolve without litigation. Without attempting to stereotype, and recognizing that many other factors can mute the impact of national/ethnic culture, scholars have discerned a continuum of contexting. Japanese, Arabic, Latin American, Italian, and (I would add) African-American cultures tend to be very high-contexting. English, French, and white North American tend to be mid-level. Scandinavian, German, and German-Swiss tend to be the most low-contexting cultures. *Id.* at 154. Most importantly, culture does not depend upon political nationality. It can transcend borders to shape the dynamics of cross-cultural communications stateside.

*programs with National. By 1991, Friar was ordering approximately \$1 million of supplies from National annually. That year and for some time before, Sanchez's main contact at Friar was a Friar purchasing agent, Jack Bowles, a white, non-Hispanic individual. Sanchez met with Bowles almost daily and was a frequent visitor to Friar's offices.*⁸⁵

Let us assume that Bowles' ethnic heritage was Anglo-Irish—a moderately high context culture. Two high-context cultures were able to meet on common stylistic grounds, and both the communication and business relationship seemed suitable. However, Sanchez had little direct involvement with other key players in the Friar purchasing hierarchy.

2. *Understanding the Real Deal*

Thus far no reported disputes or conflicts had arisen causing parties to consider a need for third-party intervention. Ostensibly, a quiet situation does not justify consulting in-house or outside legal advisors. A legal culture that sees mediation solely as a tool to settle legal disputes would concur, presuming that “mediation” means evaluative, fairly directive mediation. Under this model, since no case yet exists, the situation is not ripe for intervention.⁸⁶

An attorney operating within a twenty-first century framework would see value in facilitating a meeting to check on perceptions, successes, and concerns—even when the deal appears superficially sound. Silence does not indicate acquiescence. There could be a smoldering fire, ready to flare up as the arrangement evolves. An attorney sensitized to communication dynamics

⁸⁵ Representing a minority business enterprise, optimally, would include more than general expertise in corporate law; but, applying the skill set envisioned by Lakoff, would have “sensitivity to issues raised within minority communities by business issues.” Mathewson, *supra* note 15, at 776.

⁸⁶ This situation may be ripe for the intervention of a mediator, as described in Robert A. Baruch Bush, “*What Do We Need a Mediator For?*”: *Mediation's “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996). Although Bush ostensibly addresses negotiations involving attorneys, the principles also apply here. Negotiations often fail—or the business deal ultimately fails—because parties engage in strategic withholding of information vital to reach workable, lasting arrangements. Because parties hid information to enhance their apparent strengths, weaknesses that could have been remedied remained below the surface. If revealed within the confidential framework of a mediation, using a third-party intervener, those issues could have been dealt with in a timely and appropriate manner. Secondly, even if parties in a dyadic negotiation reveal vital information, cognitive biases can distort the message. The services of a trained facilitator can significantly reduce the cognitive dissonance, making it easier for parties to hear the pleasant and unpleasant facts alike. *Id.* at 11.

would see the benefit in helping all key participants review their expectations and concerns. Rather than being a drag on job efficiency, a process like this could prevent future failures to perform and disruptions to operations.

A session to clarify expectations would readily fit a standard facilitative approach to mediation. A transformative approach might allow even greater opportunities to explore beyond simply the success or failure of various contract terms. The open-ended approach taken in the transformative model would encourage participants to raise and pursue subtle, culturally sensitive issues that can undermine working relationships if ignored.⁸⁷

An attorney aware of the environment would have known that reasons for concern existed. A survey of 350 MBEs and 1,800 managers of CPPs of Fortune 500 companies revealed that despite twenty years of efforts at the time, the two sides cannot even “consistently agree on the principal impediments to building mutually beneficial relationships.”⁸⁸ The reasons are solid and objective. The perceptions may be subjective.

Both CPPs and MBEs agreed that the number one impediment to successful commercial relationships between them was that MBEs are often undercapitalized.⁸⁹ Granted, this presents itself objectively as a simple issue of money and not a relationship issue. Yet, entrepreneurs know that capital needs can be met in many different ways. Creative discussions about timing, insurance, bonding, necessary personnel, etc. can reveal expanded opportunities for success. Styles of facilitation that encourage open-ended, imaginative problem solving can unpack the undercapitalization issue.

CPPs saw the second most prominent impediment as MBEs’ lack of availability in specialized areas. This may correlate to the MBEs’ second ranked impediment: buyers often rely on “old boy” networks for suppliers.

⁸⁷ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 84–87 (1994).

A transformative approach to mediation does not set negotiation of particular contract terms as the goal of the process. Instead—in line with the cultural dynamics of so many businesses abroad and ethnic groups at home—the focus is on building a relationship of trust between the parties. A transformative approach seeks empowerment and recognition primarily.

Id.

⁸⁸ John N. Pearson et al., *Challenges and Approaches to Purchasing from Minority-Owned Firms: A Longitudinal Examination*, 18 *ENTREPRENEURSHIP: THEORY & PRAC.* 71, Winter 1993, at 71. The authors studied the National Minority Supplier Development Council, a non-profit organization that promotes procurement and business opportunities for minority-owned businesses, working often in partnership with the U.S. Small Business Administration.

⁸⁹ *Id.*

The ready availability of the web should make it far easier for CPPs to widen their networks, even for specialized products. Nevertheless, does something deeper lay within this articulated complaint? The CPP complaint may reflect an underlying lack of confidence. CPPs may turn to their traditional networks because they have built long-standing relationships with those suppliers. Trusting the familiar seems more reliable and lower risk.

Attorneys able to foresee and facilitate these concerns can enhance the likelihood that the deal will move forward smoothly and efficiently, thereby decreasing costs and increasing profits.⁹⁰ This is lawyering that creates value.⁹¹

Indeed, as will soon become apparent in the saga of *Sanchez v. Friar*, serious gaps existed in each participant's understanding of the situation, leading to the opposite result.

C. *A Change in the Line of Communication—and Cultural Style*

Sometime after the relationship between Bowles and Sanchez began, David Hoch became the manager of purchasing. As manager, Hoch had the power to exercise a great deal of influence and control over the awarding of contracts to minority enterprises. In addition, Hoch approved purchasing contracts, whether written or oral. Hoch is a white, non-Hispanic individual.

Let us assume that Hoch's ethnic heritage is German-American or Swiss-German, which are low-context cultures. According to the court's slip opinion, it appears that during 1991, 1992, and early 1993, Hoch had not been involved in any direct discussions with Sanchez and Bowles concerning National's business with Friar. Hoch would, however, have seen Sanchez visiting Bowles at Friar's offices. Given Hoch's later deposition testimony, it is clear that he took a very different view of Sanchez's visits than did Bowles. The record reveals perceptions that align strongly with the Hall and Hofstede theories of cross-cultural context.

⁹⁰ Menkel-Meadow, *supra* note 74, at 920. ("Studies of effective decision makers suggest that people, who can 'see the invisible,' 'hear the silences,' and 'read other people's minds,' develop a sense of the relationship of the past and future to the present and the other party's desires to the achievement of their goals."). *Id.* at 920.

⁹¹ Within a few years after the supplier problems described in this narrative, the pharmaceutical company updated its "Supplier Code of Conduct" and reinvigorated its efforts to provide "comprehensive training" coupled with "thorough assessment" to "nurture fair and ethical relationships" with their global network of suppliers, totaling an estimated nine billion dollars in purchases in 2003. *Touching Lives*, 2003 GLOBAL CITIZENSHIP REPORT (Abbott Laboratories, Abbott Park, Ill.), Apr. 2004, at 13 (2004), available at www.abbott.com/static/content/document/2003_gc_report.pdf.

In the summer of 1992, Sanchez met with Mary Iverson, Friar's director of purchasing. She advised Sanchez that Friar was downsizing its purchasing operations. Friar would reduce the quantity of vendors and would have a specific vendor handle only a specific product or group of products. Iverson told Sanchez that National was one vendor for computer supplies, and other items such as paper and industrial items. National would be accorded "partner" status by Friar, which would triple, and possibly quadruple the business Friar currently transacted with National. Iverson informed Sanchez that the increase would be gradual. Nevertheless, National needed "to get everything in place by early 1993."

Iverson also said that National "would have a written contract for computer supplies." This program would be part of Friar's "continuing long-term relationship" with Sanchez and National. Iverson's racial and/or ethnic identity is white, non-Hispanic. At this time, Sanchez informed Iverson that this program was quite important to National. A round of Defense Department base closings had eliminated National's second largest customer. Both Hoch and Bowles were aware that National was losing its second largest customer.

1. Is There a Need to Build or Re-Build Trust in This Business Relationship? How Does One Do That, If Desired?

If the company had determined to maintain a relationship with National—or at least allow National to address performance issues—counsel would have advised some form of ADR intervention to clarify expectations. Sanchez undoubtedly heard not only what was said, but what he wanted to hear.⁹²

Despite the text, what was the subtext? What was Iverson's tone? What non-verbal cues could have signaled to Sanchez that Friar's proposals were not as solid as he later would claim in court? A savvy attorney would have used a facilitator, or have facilitated the discussion herself, in order to assure the dual message communicated effectively: "Friar is dropping one line of business and may increase another. Be careful about in reliance upon this, for things can change. Life is uncertain."⁹³

⁹² The issue of emotions in executive decision-making has remained little explored, although it plays a significant role in the fate of a business. Bettina M. Whyte & Camille S. Ellis, *Fear and Other Obstacles to Successful Turnarounds*, 14-FEB. AM. BANKR. INST. J. 28, 28 (1995) ("Emotional obstacles often mask top management's ability to see the problems clearly and honestly and inhibit their ability to respond appropriately.").

⁹³ This echoes some of the themes in the Section III discussion of *Togstad*.

D. Logic, Emotion and Reliance

1. Time for a "Reality Check?"

Based on Sanchez's conversation with Iverson, National projected sales of more than \$4 million for 1994.

Was this realistic? Was it merely wishful thinking? Did Sanchez, from a high-context background, imply more in his behavior than was there? Or, was Sanchez demonstrating a higher tolerance for risk?⁹⁴ Consider how the court described the next stage in developments.

Bowles and Sanchez "began to meet regularly to discuss the expansion" of National's Friar business. During these meetings, Bowles and Sanchez "discussed numerous items, including [Friar's] need to increase its minority purchasing." They also discussed Friar's "desire" that National be Friar's "main minority supplier;" that Friar was "committed" to National due to National's "performance record and location." Further, Bowles and Sanchez "discussed" National's "taking over the distribution of the products" for a specific Friar warehouse (W-21), and that Friar "would expand its purchase of computer and laser printing supplies" from National. Friar's "continuing long-term relationship" with National "would involve a five to ten year commitment" between the parties.

In early 1993, Bowles "began to negotiate a contract" with National for Friar "to purchase exclusively from [National] 4,800 products previously purchased from other vendors." Bowles "estimated the sales volume" to National would range "between \$1.5 million to \$2 million, at a gross profit of 20%, and with yearly volume increases."

At this stage, if Friar's CPP did not intend to form a long-term, probably exclusive purchasing agreement with National, Friar's counsel had reason for concern. As much as anything else, intervention by an attorney or manager trained in active listening and problem-solving can clarify within the corporation itself the goals, strategies, and methods to use. Not infrequently, personnel and policies are not in alignment, opening the corporation to potentially serious legal consequences.

In addition to facilitating an in-house discussion of Friar's intention and message, a twenty-first century legal culture would welcome the opportunity

⁹⁴ Consider Regina F. Burch, *The Myth of the Unbiased Director*, 41 AKRON L. REV. 509 (2008) (detailing research on risk assessment in corporate law and how emotions and cognitive bias affect risk assessment, impacted by demographic characteristics of the actors and cultural norms).

to engage an outside neutral to mediate the agreement—assuming that Friar actually intended to enter into an agreement with National.

2. Facilitation/Mediation to Separate Subjective, Objective and Interpretation

Beyond the intangibles of trust-building, there are clear questions of business management and law to address:

- Are they negotiating an oral contract?
- Is this the prelude to a contract?
- When will the agreement be committed to writing?
- Must the contract be written in order to be enforceable, or to have persuasive power in a later lawsuit?

An observer would readily query: Why has Sanchez not insisted already on a written memorandum of understanding? Most likely, the relationship had been cordial, indeed quite affable. As Macaulay had pointed out generations ago, well before business discourse was commonly analyzed in terms of context, invoking terms of the written contract itself could be perceived as an insult—a suggestion that the other party is untrustworthy.⁹⁵ Overarching corporate norms in America suggest that business people are loath to litigate a business contract gone awry. Typically, every effort will be made to act as if all is well before admitting that things actually have gone irrevocably off track.

Thus, a facilitated review of the contract—whether undertaken formally or informally, but operating through legal counsel—would have brought participants to a necessary level of awareness. Awareness needs to be focused not only on personality/emotional dynamics, but also on the implications as a matter of law. The logic and rationality of the attorney can well serve management's purposes on both sides of the transaction by giving the reluctant participants a person outside the cultural norms of the business world to blame for raising the unpleasant but necessary issues: the attorney. By balancing logic and intuition, the attorney helps management save face and save the organization from a lawsuit.⁹⁶

⁹⁵ Macaulay, *supra* note 79.

⁹⁶ Less than ten years following the event described in this extended narrative, the pharmaceutical company demonstrated that it not only opposed discrimination in the workforce, but supported affirmative action, by filing as an amicus curiae (along with several other Fortune 500 companies). Brief of 3M et al. as Amici Curiae Supporting

This did not, however, occur in *Sanchez v. Friar*, as continued below.

E. *The Long Slide Toward Litigation*

1. *Objective Evidence of a Breakdown in Trust*

In approximately April 1993, Bowles and Hoch advised Sanchez that Friar would no longer honor its "commitment" to National. Rather than assuming all the business at the W-21 warehouse, National would split distribution with another vendor, GDI. This may well have seemed devastating to Sanchez. But, on the other hand, Bowles and Hoch offered that if National would continue its relationship with Friar, National "would see a substantial increase" in Friar business.

On May 17, 1993, Bowles left his Friar position in purchasing for another Friar position. Bowles' responsibilities were assumed by Hoch. On May 18, 1993, as Sanchez walked by Hoch's office, Hoch "hollered at" Sanchez and said "Well, I guess you're all mine now."

Until this, Sanchez has probably had little or no direct contact with Hoch. The statement clearly baffled Sanchez, for Hoch went on to explain, "Well, [Jack's] gone now, you're all mine now. You're gonna deal with me now."

Sanchez was troubled. He discussed the exchange with Bob Butler, an African-American who was Friar's manager of corporate MBE/WBE business development.

2. *Is Discrimination in the Eye of the Beholder?*

The court found later that Butler, manager of minority business enterprise development, failed to take appropriate action. Thus, the corporation failed. However, one might well ask: what would be appropriate under these circumstances?

Again, a twenty-first century legal practice would have recognized the pattern as a conflict of high-context versus low-context cultures. If there had been no earlier interventions, or if Butler had understood his responsibility to report this to counsel, mediation could have mitigated much of the damage.

Defendants/Appellants, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2001) (No. 01-1447). The hiring and management of minorities in the workplace may not be fungible with establishing and managing relationships with MBEs, a company's conduct regarding diversity in employment merits consideration as an indicum of policy and corporate intentions regarding implementation.

At this stage, still, it could be framed as a problem that could be remedied by addressing differences in communication styles or expectations.⁹⁷

However, because no ADR intervention occurred, Sanchez continued with business as usual. Hoch apparently did not communicate his concern. Perhaps that did not comport with his cultural or personal communication style. Or, he may have already decided to terminate National as a supplier—whether it comported with Friar company policy and whether it was defensible in court—or not. Hoch may have begun building a file against Sanchez simply to justify—post hoc—his decision to terminate the supplier agreement. One can only speculate as to the response of corporate counsel if they had known.

In 1993, sales to Friar represented approximately 90% of National's entire business. Less than two months after the "you're all mine" comment, Hoch telephoned Sanchez and advised him that they needed "to conduct an emergency meeting" immediately.

As later described by the court, Hoch used this meeting to inform Sanchez that Sanchez's "racial identity was a problem" for Hoch. According to Hoch, "as a result of Sanchez's race," Friar's users thought Sanchez "lied, cheated and stole." No details are offered in the slip opinion.

Indeed, would objective facts have mattered? For Hoch went on to reveal his underlying subjective issues: Hoch "could not personally deal with nor was he comfortable with racial minorities." Therefore Hoch "dreaded telephone calls" from Sanchez; Hoch claimed "he knew there was always a problem." Hence, Sanchez "should never call him." Further, Sanchez "should never come to [Friar's] offices unless he had a specific appointment to do so or unless [Hoch] called him."⁹⁸

⁹⁷ Abbot, *supra* note 91, at 11. By 2003, the pharmaceutical company had restructured its Office of Ethics and Compliance to assure the company's "core values" were understood and enforced company-wide. The company took action to improve its intra-corporate communications to "actively encourage employees to bring forward questions and concerns about compliance with the Code of Business Conduct." Recognizing that many of the company's employees may be more comfortable speaking about delicate matters in their native (non-English) language, the company has installed an Ethics and Compliance hotline to be a "multilingual and confidential resource available to employees 24 hours a day, seven days a week." Retaliation against anyone who makes a good faith complaint is prohibited.

⁹⁸ *Id.* at 14. This narrative stands in contrast to the picture of the company in 2003. The Abbott Laboratories' *Global Citizenship Report* underscored the company's commitment to continue and "increase the purchase volume directed to minority-owned, women-owned and disadvantaged businesses." Abbott Laboratories, *supra* note 91. Spending for MBEs (the "Sanchez" category) was \$121 million in 2001; \$135 million in

The casual, friendly, engaging style of Sanchez was viewed through the lens of racial stereotypes. Any attorney must cringe when seeing in print the statements of the company's employee taken in the deposition, repeated by the court word-for-word. Avoiding situations like this is a key reason ADR exists.

Sanchez met with Butler shortly thereafter and informed Butler about his meeting with Hoch. Butler informed Sanchez that he was "aware" that Hoch "disliked racial minorities," and that he was "aware" that Hoch "planned to have the conversation" with Sanchez. Butler had advised Hoch "against having the conversation." The court later found that Butler "took no action despite the fact that he was aware" of Hoch's conduct.

Given this additional information, one can only speculate whether Hoch has a reputation within Friar itself as something of a bully.⁹⁹ Recall that Butler is also a racial minority. Although one would assume Butler had some official authority within Friar's organizational structure—if only to assure the company's compliance with federal law—he failed to act. If Friar's legal counsel had already institutionalized the use of ADR processes, Butler would not have had to confront Hoch on his own. With ADR, he could have communicated the message in a structure that was supportive and aligned with the preferred corporate cultural norms which demand non-discrimination and favor diversity and inclusion in the workplace—among suppliers.¹⁰⁰

Specifically, what ADR options should Friar have pursued? Purely facilitative mediation would not offer the institutional support for a particular principle, such as maintaining a diverse and inclusive workplace. Instead, mediation would need to be evaluative, framing, reframing, and problem-solving based on principles that reinforce the corporation's policies, objective interests, and legal duties. This is not an occasion for interest-based negotiation. The situation has evolved beyond assuaging personality clashes. Instead, the astute lawyer would, in the interests of the company as a whole, prefer to use a directive, principle-based approach that educates Hoch to bring him in alignment with the company's stated goals: a commitment to utilize minority business suppliers and a legal obligation not to engage in race discrimination.

2002; and \$150 million in 2003. This is not presented as a mere public relations matter, but as a quantifiable benefit to Abbott.

⁹⁹ See Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315 (2004) (describing how employees, especially men, are reluctant to report and to act upon charges of intimidation by fellow employees).

¹⁰⁰ Abbott, *supra* note 91, at 29.

The best outcome that one might expect from this type of ADR intervention would be that Hoch and Sanchez would learn different ways to communicate and conduct business. Collegiality is not essential in order to do business, but good faith is. An attorney would use the intervention not to transform the actors at a subjective, non-rational, emotional level. Instead, the goal would be to identify objective behaviors and measures, within an agreed-upon structure, to assure compliance by all actors.

Finally, this more formal intervention becomes a ritual and a record, articulating the company's overarching goals and assuring mid-level management (in this large corporation) compliance. After all, ultimate legal liability falls on the corporation, not on employees such as Hoch. Irrespective of efforts to secure privacy, the attorney-led action will have a marked influence on behavior within the company with ripple effects that enhance self-directed compliance with corporate policies.

F. A Bitter Ending

In August and September 1993, National observed a 71.2% increase in product orders from Friar as compared to the preceding month. But, these two months may have been an illusion. On September 24, 1993, Sanchez met with Hoch. In the meeting, Hoch informed Sanchez that due to a "glitch" in the computerized purchasing system at Friar, Friar would use only one vendor to distribute for the W-21 warehouse. It would not be National.

In addition, Hoch told Sanchez that Friar would purchase the 4,800 products from GDI that it had "agreed" to purchase exclusively from National. Sanchez claimed that the purported "glitch" in the computerized purchasing system was a pretext for racial and/or ethnic discrimination.

Clearly, trust had evaporated. Yet Sanchez continued to communicate directly, rather than through an attorney with facilitation skills.

On October 4, 1993, Sanchez met with representatives of Friar to discuss his proposal for salvaging his business with Friar. Hoch refused to hear the proposal, stating that his decision to reduce National's business was final. Hoch informed the parties present that he had awarded GDI a written five-year, non-competitive bid contract for office and computer supplies.

Sanchez complained to Iverson on December 15, 1993. Iverson informed Sanchez that the elimination of National's business was due to Friar's decision to use one supplier and not due to a glitch in the computerized

purchasing system. Sanchez claimed this second purported reason for eliminating business was a pretext for racial and/or ethnic discrimination.¹⁰¹

In the ensuing months Friar "squeezed" National, decreasing orders and insisting on price changes in contravention of contract terms. As a result, National's business continued to decline. National's business with other customers was extremely insignificant because of the great deal of attention Sanchez and National provided to Friar. Sanchez was forced to terminate three employees. Two other employees quit because of the poor outlook for National. Sanchez was forced to handle all major business operations himself. National filed for bankruptcy the following year. Sanchez filed suit in federal court claiming racial discrimination.

V. CONCLUSION

The *Sanchez v. Friar* narrative is offered to put "flesh" on the "bones" of transactional lawyering as encountered in the day-to-day life of business in the modern world. The limited reference points of nineteenth century thinking no longer provide sufficient breadth of vision for the twenty-first century practitioner. Indeed, as this narrative demonstrates, the very nature of what constitutes the practice of law is undergoing reconstruction. The twenty-first century has arrived, not-so-quietly announcing the demise of the billable hour, piece-work attorney-client engagements. Instead, an attorney's value will be found in developing a long-term relationship of trust, where the client can rely upon their counselor to understand not only the technicalities of the written law, but the unwritten realities of the business deal. The growing movement toward a fixed fee to support the counselor-at-law, wise person role reflects a need for American law firms to provide much more than clients can obtain through the web or outsourcing or on their own. As Macfarlane points out, and as the *Sanchez v. Friar* narrative illustrates, hard-core law remains a vital part of the new lawyer's role. The twenty-first century lawyer will, indeed, have mastered the basic ADR skills of active listening, facilitation and problem-solving, but they will often not be applied as a separate set of tools appended to a matter destined for litigation. Instead, the new lawyer will "use her legal expertise to further her clients' chances of an outcome that meets their needs and is durable and feasible."¹⁰² As

¹⁰¹ *Id.* at 30. Again, one finds a contrast between the Abbott Laboratories of 2003 and the pharmaceutical company one could read into this narrative. Within five years after this lawsuit was filed, Abbott began a series of awards as one of Fortune magazine's "50 Best Companies for Minorities."

¹⁰² MACFARLANE, *supra* note 38, at 189.

suggested at various stages throughout the *Sanchez v. Friar* narrative, the new lawyer will use legal principles to “provide a beginning point for a discussion over acceptable principles,”¹⁰³ especially when a dyadic negotiation amongst the principals might unduly strain interpersonal relationships.

Throughout the *Sanchez v. Friar* scenario I have suggested ways the very public legal disaster could have been averted by utilizing ADR skills and options. The communication issues in this corporate setting were not as stark as the introductory illustrations involving clients who functioned primarily outside of mainstream, commercial American society. The cases did, however, share the problem of unacknowledged cultural reference points that typically privileged the perspective of the lawyer over that of the client, the majority over the minority. This article posits that issues of race, ethnicity, age, gender, and status—both within the entity client and without—can respond to a nuanced, well-timed usage of ADR to elicit productive narratives.

Narrative comprises the *material prima* of the attorney-client relationship. As Lakoff’s analysis explains, the non-rational, emotive, intuitive elements of the narrative deserve much stronger emphasis than legal education and the legal profession have allocated. ADR skills are needed for attorneys to extract not only text but subtext; to bridge unrecognized gaps among cultural norms; and—as the savvy transactional lawyer—to help reconcile corporate policies and operational cultures.

As this symposium recognizes, the future of ADR involves “increased accessibility to lawyers and non-lawyers alike,” and “engaging wider audiences.” All of the cases discussed in this article would have benefited from a legal culture that did not wait on the sidelines until a communication near-miss or failure had already erupted into litigation.¹⁰⁴ In the twenty-first century, a thriving legal practice will blend ADR skills with substantive expertise in the law to re-establish the valued role of the counselor-at-law. This is the type of legal culture the Moritz College of Law and the *Ohio State Journal on Dispute Resolution* have nurtured so admirably, to which the profession and this author owe a debt of gratitude.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY? (1994) (envisioning a turnabout from the rights-driven, litigation-minded trends that seemed to characterize the latter quarter of the twentieth century).